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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 656

BILLIE P. JONES, formerly BILLIE P. SCHELLENBERGER, Administratrix of the Estate of RALPH D. SCHELLENBERGER, Deceased,

Petitioner,

VS.

JAMES A. SCHELLENBERGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

PAGE

Opinion Below 2

Jurisdiction 2

Specification of Errors 3

Questions Presented 4

Statement of Facts 4

Reasons Relied Upon for the Allowance of the Writ.

I. The action of the defendant in the trial court and on the two appeals to the U. S. Court of Appeals waived the defense of joint tenancy allegedly created by the articles of co-partnership 10

II. The case of *Lynch* v. *Ilg* is not controlling and is clearly distinguishable on its facts from the case at bar 15

III. The questions involved fundamental rights of far-reaching importance 21

Conclusion 23

Appendix "A"

Opinion of the U. S. Court of Appeals (May 26, 1955) 25

Appendix "B"

Opinion of Appellate Court of Illinois 43

Appendix "C"

Opinion of the U. S. Court of Appeals (January, 16, 1953) 49

CASES CITED.

Altschuler v. Altschuler, 399 Ill. 599 14

Arkansas South Eastern R. Co. v. Union Sawmill Co., 154 Fed. 304 (CCA 5) 14

Carpenter v. Durell, 90 Fed. (2d) 58 (CCA 6) 15

Chicago Wooden Ware Co. v. Miller Ladder Co., 133 Fed. 541 (CCA 7) 14

Cook-Master v. Niero Steel Products, Inc., 339 Ill. App. 519 21

David v. Ridgely-Farmers Safe Deposit Co., 342 Ill. App. 96 19

Deslaureiers v. Senesac, 331 Ill. 437 19

Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275 13

Fisher v. Bank of Am. Nat. Trust & Savings Ass'n., 72 Fed. (2) 635 (CCA 9) 15

Hay v. Bennett, 153 Ill. 271 19

Hughes v. Bandy, 336 Ill. App. 472 17

Illinois v. Illinois Cent. Ry. Co., 184 U. S. 77 15

Illinois Bankers Life Ass'n. v. Collins, 341 Ill. 548 21

Jones v. Haller, 123 Fed. (2d) 845 (CCA 2) 14

Kaku Nagano v. Brownell, 212 Fed. (2) 262 (CCA 7) 14

Kane v. Johnson, 397 Ill. 116 20

Kasishke v. Baker, 144 Fed. (2) 384 (CCA 10) 14

Lemen v. Estate of Gote, 203 Ill. App. 50 19

McCann v. Continental Casualty Co., 7 Ill. App. 2d 527 18

McCune v. Reynolds, 288 Ill. 188 19

Meccano, Ltd. v. Wanamaker, 253 U. S. 136 13

Metropolitan Water Co. v. Kaw Valley Drainage District, 223 U. S. 519 13

Mustain v. Gardner, 203 Ill. 284 19

Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 106 Fed. (2) 891 (CCA 8) 15

Reed v. Allen, 268 U. S. 191 14

Rubert Hermanos, Inc. v. Peo. of Puerto Rico, 118 Fed. (2) 757 (CCA 2) 14

State of Kansas v. Occidental Life Ins. Co., 98 Fed. (2) 935 (CCA 10) 15

Smith v. Farmer's State Bank, 392 Ill. 456 14

Smith v. Vulcan Iron Works, 165 U. S. 518 13

Thorton v. Carter, 109 Fed. (2) 320 (CCA 8) 15

Wade v. Blieden, 86 Fed. (2) 75 (CCA 8) 14

In Re Estate of Wilson, 404 Ill. 207 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1955.

No.

BILLIE P. JONES, formerly BILLIE P. SCHELLENBERGER, Administratrix of the Estate of RALPH D. SCHELLENBERGER, Deceased,

Petitioner (Plaintiff-Appellee below)

vs.

JAMES A. SCHELLENBERGER,

Respondent (Defendant-Appellant below)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Billie P. Jones, formerly Billie P. Schellenberger, Administratrix of the Estate of Ralph D. Schellenberger, deceased, Petitioner, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeal for the Seventh Circuit entered in the above entitled cause on the 6th day of September, A. D. 1955, reversing the judgment of the United States District Court for the Northern District of Illinois, Eastern Division,

and remanding the same with directions that the complaint be dismissed. The judgment became final on the 7th day of November, 1955, upon the denial of Petitioner's (Appellee Below) Petition for Rehearing.

Opinion Below.

The original opinion of the Circuit Court of Appeals for the Seventh Circuit rendered May 26, 1955, affirming the decree of the United States District Court for Northern Illinois, Eastern Division, is not reported, the same having been superseded by the opinion on re-hearing dated September 6, 1955, which is reported as 225 F. 2d, 784. The opinion of May 26, 1955, is for the convenience of the court attached hereto as Appendix "A".

Jurisdiction.

The judgment of the United States Court of Appeals sought to be reversed was entered on the 6th day of September, A. D. 1955, and the Petition for Rehearing was denied on November 7, 1955. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1).

Specification of Errors.

The Circuit Court of Appeals erred:

(1) in reversing the judgment of the District Court entered September 27, 1954, ordering the defendant, James A. Schellenberger to pay the plaintiff within thirty days the sum of $268,049.13, and ordering execution in default of payment. (Tr. 172)

(2) in not holding that the respondent, by his course of conduct, especially relative to the decree of September 20, 1951, and his appeal from the decree of August 8, 1952, abandoned the defense of joint tenancy and survivorship under the articles of co-partnership.

(3) in failing to hold that the order entered April 5, 1950, and September 20, 1951, were final orders and settled all questions of the substantive rights of the parties.

(4) in holding that the case of *Lynch* v. *Ilg*, 348 Ill. App. 545, is decisive of the issues of substantive law raised in the appeal.

QUESTIONS PRESENTED.

1. Were the prior decress "res judicata"?
2. Is Lynch v. Ilg, 348 Ill. App. 545, controlling?

Statement Of Facts.

On December 10, 1937, Ralph D. Schellenberger and his brother the defendant, James A. Schellenberger entered into Articles of Co-partnership in Chicago, Illinois. The Articles of Co-partnership contained among others the following provisions:

> "It is further agreed that the party of the first part and the party of the second part shall both and each of them participate in and own the said business and partnership as joint tenants with the right of survivorship, and upon the death of either party hereto, all right, title and interest therein shall vest immediately unto the surviving partner. * * *
>
> "In case of the death of either partner, the whole of the assets or effects of said partnership shall accrue immediately to the surviving partner." (Tr. 10, 12)

The facts are undisputed:

On July 1st, 1945, Ralph D. Schellenberger died leaving a widow and a minor child.

On October 14, 1948, the widow as Texas administratrix of the estate of her deceased husband, filed her complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division; jurisdiction being founded upon diversity of citizenship and amount. (Tr. 4)

The complaint alleged in substance that the defendant after the death of the plaintiff's intestate took no steps to settle said partnership as surviving partner and has

not paid over to the plaintiff as administrator any money or proceeds of said partnership; and has not made any accounting whatsoever.

The complaint prays for a temporary injunction restraining the defendant from selling, assigning or transferring the assets of the co-partnership, for the appointment of a receiver, and for an accounting. (Tr. 4-11)

On November 10, 1948, the defendant filed his answer to the complaint and attached the articles of co-partner ship dated December 10, 1937. (Tr. 7, 9)

On June 14, 1949, the plaintiff moved the court to strike defendant's answer, particularly that part which related to the rights of survivorship allegedly existing pursuant to the articles of co-partnership.

On April 5, 1950, the District Court struck the affirmative defense, which order made the following finding:

> "Having, therefore, established that the act mandatorily creates a tenancy in partnership it still remains to be determined whether or not a tenancy in partnership and a joint tenancy with the right of survivorship may mutually co-exist. That proposition must be answered in the negative for the reason that the most fundamental distinguishing element of the former is that there is no right of survivorship. (Tr. 20)"

The cause was by said order re-referred to a Master in Chancery under a general reference. (Tr. 20). No appeal was taken from this order.

On September 11, 1950, William L. Kelly, at the instance of the defendant, filed a petition in the Probate Court of Cook County praying the appointment of an administrator for the estate of Ralph Schellenberger, deceased; and pursuant thereto, Thomas J. Phelan was appointed administrator. Subsequently Noah J. LaReau was appointed successor administrator.

On December 18, 1950, the administrator moved the court to substitute himself as administrator as additional party plaintiff, and after reference to the Master, leave was denied on June 11, 1951. (Tr. 52; 58)

From this order the Illinois administrator appealed to the United States Court of Appeals, Seventh Circuit, where the order was affirmed. (196 F. 2d 852)

The defendant was made a party in the Court of Appeals and entered his appearance. The same counsel who had been employed by the defendant to obtain the appointment of the Illinois administrator, represented such administrator in the District Court as well as in the Appellate Court on appeal, and was paid for his services by the defendant.

On June 11, 1951, a memorandum order was entered in the trial court which contained inter alia the following:

> "The court previously struck the defense set forth in defendant's answer to the effect that the articles of co-partnership provided for a joint tenancy with right of survivorship in the partnership business and referred the cause generally to Master Joseph Elwood to hear and determine."

This order overruled the objections and affirmed the Master's report. (Tr. 58)

On September 20, 1951, the case came on for a hearing upon the Master's Report and the aforesaid objections and a decree was entered finding among other things:

> "13. That during the operation of the said partnership business, both before and after the death of plaintiff's intestate, the partnership built and developed good will and franchise rights in selling to the public used and new automobiles and that

the said good will became a partnership asset entitling plaintiff's intestate to share in the profits thereof and that upon the dissolution of said partnership an account should be taken and the market value of said assets including the good will and franchise rights thereof should be ascertained and sold at market value and distributed in accordance with the laws of the State of Illinois."

The decree further found:

"14. That this court by an order entered on to-wit: April 5, 1950, had stricken from the defendant's answer the affirmative defense relating to partnership joint tenancy and the right of survivorship because, the right of joint tenancy and the right of survivorship in partnership assets and property may not mutually co-exist by reason that a fundamental distinguishable element of the tenancy in co-partnership is that there is no right of survivorship. (Tr. 64)"

In the decretal part of the order the court ordered an accounting of the partnership to date. (Tr. 84) and re-referred the matter to the Master to take an accounting. No appeal was taken from this order.

On April 29, 1952, while the Appeal No. 196 F 2d 852 was pending in the U.S. Court of Appeals, the plaintiff filed in the District Court a petition for the apointment of a receiver, which petition referred to the previous decree of the court directing the defendant to account and to the decree denying substitution of the Illinois Administrator as party plaintiff. The defendant filed an answer denying that the petitioner was entitled to the relief sought. The matter was referred to the Master in Chancery.

On August 8, 1952, a decree was entered reciting the decree of September 20, 1950 and that the plaintiff as

administratrix was entitled to an accounting from the defendant; that the defendant had failed and refused to make an accounting; that the defendant had not appealed from the decree of September 20, 1951; and that "it is res judicata and these questions are no longer open to the defendant." The decree appointed a receiver and directed the defendant to "immediately set over, transfer, assign and deliver to the receiver all the assets of the partnership."

From this decree the defendant appealed. The decree was affirmed by the U.S. Court of Appeals (201 F. 2d, 29).

In this appeal the defendant stated:

> "The District Court erred in holding that there was any evidence in support of the conclusion of law that Ralph D. Schellenberger at the time of his death had any interest in the assets of partnership or profits attributable to it thereafter."

The defendant, however, did not argue that point in its briefs filed in the Court of Appeals. (See appendix "A", Opinion, May 26, 1955.)

On September 27, 1954, a decree was entered in the District Court which affirmed the Master's Report of June 10, 1953, and the supplemental report of August 21, 1953; overruled the objections of the defendant to the said reports and found that the plaintiff should have and recover from the defendant, James A. Schellenberger the sum of $268,049.13 and directed the defendant to pay the said sum with statutory interest thereon within 30 days and upon his failure so to do, that execution issue (Tr. 72).

It was from this decree that the instant appeal was perfected to U.S. Court of Appeals as case No. 11321. (225 F. 2d 784).

On May 26, 1955, the U.S. Court of Appeals rendered an opinion affirming the decree of the District Court of September 27. 1954. (Tr. 176) This opinion was not filed but is attached hereto as Appendix "A".

The defendant petitioned the court for a rehearing which was allowed and on September 6th rendered a second opinion reversing the decree of the District Court of September 27, 1954, (225 F. 2d 784) and remanding the same with directions to dismiss the complaint.

The plaintiff by leave of court filed a Petition for Rehearing and the relief therein sought was denied on November 7, 1955.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The action of the defendant in the trial court and on the two appeals to the U.S. Court of Appeals waived the defense of joint tenancy allegedly created by the articles of co-partnership.

The proceedings in this case were needlessly prolonged by two previous appeals to the Court of Appeals, especially in view of the fact that the facts were not disputed and the sole issue upon which the defense was predicated was the survivorship provisions of the articles of co-partnership by reason of which it was urged that the decedent's property passed to the defendant and that he became the sole owner of it in its entirety.

One of the defenses set forth in the answer of the defendant in the trial court was the assertion that the defendant's failure to account because of the lack of knowledge of plaintiff's appointment as administratrix. The answer also set forth the articles of co-partnership and an affirmative defense predicated upon the joint tenancy and survivorship clause therein contained.

A motion to strike the so-called affirmative defense was made and decided adversely to the defendant on April 5, 1950, and in sustaining the motion the trial court held:

> "Having heretofore established that the Act (Illinois Partnership Act) mandatorily created a tenancy in partnership, it still remains to determine whether or not a tenancy in partnership and a joint tenancy with rights of survivorship may mutually exist. That

position must be answered in the negative for the reason that the most fundamental distinguishing elements of the former is that there is no right of survivorship."

On affirming the Master's Report, the trial court held that the joint tenancy and right of survivorship agreement *was inconsistent with the partnership* and re-referred the cause to the Master for an accounting.

That the defendant at this time abandoned and waived its affirmative defense is clearly demonstrated by his action of September, 1950, when he requested an attorney employed by him to file letters of administration in the Probate Court and petitioned the court for the appointment of an Illinois administrator for his deceased brother's estate. This petition was prepared by an attorney to whom the defendant paid the sum of $1,400.00 for his services. It alleged that the decedent left a personal estate of the approximate value of $2,500.00 and that his widow and a minor child were his only heirs at law.

This administrator shortly thereafter filed an inventory in this estate in which he stated under oath that the decedent left as his only personal estate *"an undivided one-half interest in the partnership of James A. Schellenberger and Ralph D. Schellenberger,"* and on December 19th, 1950, the substituted administrator sought to be substituted as a party-plaintiff in the instant case.

The trial court denied defendant's motion and from this motion the Illinois administrator appealed. The defendant was made a party appellee to this appeal and could have in this appeal raised every issue which it

subsequently sought to raise in its final appeal to the Court of Appeals. In passing upon this issue the Court of Appeals in its first opinion said:

> "It is hardly open to question but that defendant is chargeable with all that transpired in the abortive attempt to have LaReau substituted as a party-plaintiff. At that time defendant evidently elected, and with design, not to contest further the adverse portion of the decree relative to the defense based upon the "survivorship provision." This is evidenced by the fact that defendant solemnly represented to the Illinois Probate Court that the deceased partner, at the time of his death, was the owner of a one-half interest in the partnership property; in other words, a representation diametrically opposed to that now made, that the defendant is and has been at all times the sole owner. Moreover, defendant's effort to have the Illinois administrator substituted as a party-plaintiff was a clear recognition on his part of the validity of the court's decree which had directed an accounting. In fact, it represented to the court at that time that the purpose of securing the substitution of an Illinois administrator was to protect Illinois creditors, of which defendant was one, he having filed a claim in the Probate Court against the decedent's estate. Thus, the legal effect flowing from the effort to substitute an Illinois administrator was in aid and not in derogation of the action for an accounting. Defendant's activity in seeking the appointment of an Illinois administrator under the circumstances related, for the purpose of conducting the suit for an accounting, was an abandonment or waiver of a defense based upon the "survivorship provision." This conclusion finds strong support in defendant's answer denying that he had refused to account and his allegation that he had delivered to plaintiff a portion of the partnership assets as found by the District Court. It is ele-

mentary that a party may waive a condition or stipulation made in his own favor. *Westinghouse Electric Corporation* v. *Bulldog Electric Products Co.*, 179 F. 2d, 139, 146."

In the case of *Meccano, Ltd.* v. *Wanamaker*, 253 U. S. 136, 141, this court at page 141 of the opinion said:

> "This power is not limited to mere consideration of, and action upon, the order appealed from; but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated."

In the case of *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275, this court stated at page 280 of the opinion:

> " • • • the bill could not properly be dismissed upon appeal unless it appeared that the court was in possession of the materials necessary to enable it to do full and complete justice between the parties, and further, where 'upon the face of the bill there is no ground for equitable relief, the appellate court may finally dispose of the merits upon an appeal from an interlocutory order.'"

In the case of *Metropolitan Water Co.* v. *Kaw Valley Drainage District*, 223 U. S. 519, the court stated at page 253:

> "For while at one time there was some difference in the rulings on that subject, it was finally settled by *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, that on appeal from a mere interlocutory order the Circuit Court of Appeals might direct the bill to be dismissed if it appeared that the complainant was not entitled to maintain its suit."

In the case of *Smith* v. *Vulcan Iron Works*, 615 U. S. 518, the court in discussing the purpose of permitting an appeal from a temporary order, at page 525 held:

> " • • • to save both parties from the expense of further litigation, should the appellate court be of

opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it."

No rule is better established in appellate practice (state and federal) than the one which limits the briefs and arguments, and the consideration by the reviewing court to the errors assigned. The same rule applied equally to errors which could have been raised. They are considered waived and abandoned by the party appealing. (*Smith* v. *Farmer's State Bank*, 392 Ill. 456; *Wade* v. *Blieden*, 86 Fed. (2) 75, (CCA 8); *Kaku Nagano* v. *Brownell*, 212 Fed. (2) 262 (CCA 7)).

The two decrees entered on April 5, 1950 and September 20, 1951, settled substantive rights and were appealable. An order is final and appealable only if it is of a character which settles substantial rights, which makes no reservation as to its effect, and which is operative in a way affecting rights at once, and before or irrespective of the final decree in the main litigation. (*Rubert Hermanos, Inc.*, v. *People of Puerto Rico*, 118 Fed. (2) 757 (CCA 2); *Kasishke* v. *Baker*, 144 Fed. (2) 384 (CCA 10); *Altschuler* v. *Altschuler*, 399 Ill. 559)

The appeal by defendant from the receivership, (201 Fed. (2) 29), involved a consideration of all the issues determined by the decrees entered; April 15, 1950, June 11, 1951, September 20, 1951 and August 8, 1952. (*Jones* v. *Haller*, 123 Fed. (2d) 845 (CCA 2); *Chicago Wooden Ware Co.* v. *Miller Ladder Co.*, 133 Fed. 541 (CCA 7); *Reed* v. *Allen*, 268 U. S. 191; *Arkansas South Eastern R. Co.* v. *Union Sawmill Co.*, 154 Fed. 304 (CCA 5)).

After the mandate issued in *Jones* v. *Schellenberger*, 201 Fed. (2) 29, the decree appealed from became the settled law of the case. Nothing could be brought up but

the proceedings subsequent to the mandate. (*Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 106 Fed. (2) 891 (CCA 8); *Illinois* v. *Illinois Cent. Ry. Co.*, 184 U. S. 77, 91-93; *State of Kansas* v. *Occidental Life Ins. Co.*, 95 Fed. (2) 935 (CCA 10) (certiorari denied 305 U. S. 603)).

Subsequent to the decision of this Court in *Jones* v. *Schellenberger*, (201 Fed. (2) 29) every question which might have been raised and thereby decided became final and should not be reexamined on further appeal. (*Fisher* v. *Bank of Am. Nat. Trust & Savings Assn.*, 72 Fed. (2) 635, 637 (CCA 9); *Carpenter* v. *Durell*, 90 Fed. (2) 58 (CCA 6); *Thornton* v. *Carter*, 109 Fed. (2) 320 (CCA 8)).

II.

The case of Lynch v. Ilg is not controlling and is clearly distinguishable on its facts from the case at bar.

The final decision of the Court of Appeals in the instant case was based exclusively upon the decision of the Illinois Appellate Court, First District, in the case of *Lynch* v. *Ilg*, 358 Ill. App. 545, (published in abstract form; December 16, 1952) and the denial of the Supreme Court for requested Leave to Appeal, 413 Ill. 627. There is, as pointed out, in both decisions of the Court of Appeals no decision by the Supreme Court of Illinois on this precise issue, and the decision is predicated solely upon the presumption that if the question was squarely presented to the Supreme Court they would follow the Appellate Court's decision. In view of the many Supreme Court cases negating the principles announced by the Appellate Court's decision in the *Ilg* case, this assumption cannot be relied upon.

The holding of the final determination of the Court of Appeals in this regard is erroneous for the following

reasons. First, by comparison of the language of the *Ilg* case and the language of the alleged contract in the present case; second, by an appeal to the logic of the situation, for if the *Ilg* case were controlling, then that case in effect overruled the entire corpus of the substantive law of Illinois governing joint tenancy; and third, the *Ilg* case is a decision of one of the branches of the Illinois Appellate Divisions and not a decision of the Illinois Supreme Court.

In the District Court this very problem was carefully and learnedly considered, and in treating this problem, the trial court said:

> "I conclude: first, *that the survivorship language in Ilg v. Lynch is essentially different from that in the case at bar* (in that the language here does not expressly bar an accounting) and that the holding in the *Ilg* case is not evidence as to the Illinois law in the case at bar; and second, *that there is persuasive evidence that the Supreme Court of Illinois, if passing upon the issue in the case at bar, would hold that the right of plaintiff to an accounting is not precluded.* I, therefore, overrule defendant's contention that the plaintiff's right to an accounting is barred." (Italics ours.)

The co-partnership agreement in the case at bar contains the following language:

> "It is further agreed that the party of the first part and the party of the second part shall both and each of them participate jointly as joint tenants with the right of survivorship, and upon the death of either party hereto all right, title and interest therein shall vest immediately unto the surviving party. • • •
>
> "In case of the death of either partner the whole of the assets or effects of the said partnership shall accrue immediately to the surviving partner."

In the *Lynch* v. *Ilg* case, the following language is used:

> "This partnership shall continue for and during the joint lives of the parties, and upon the death of one the survivor shall ipso facto be and become the sole owner of the entire partnership business and assets, including all cash on hand or in bank accounts and bills receivable, *without any obligation of any nature to pay the estate, executors or heirs of the deceased partner any consideration thereof.* • • • " (Emphasis ours.)

The Illinois Appellate Court in interpreting this language significantly stated:

> "The effect of agreement set forth *was merely to waive the accounting which the estate of the decedent would otherwise have.*"

In the *Ilg* case the parties transferred the proprietary interest of the partnership (business and assets) to each other *at the time of the execution of the partnership contract,* while in the case at bar an attempt was made by the alleged contract to transfer in praesenti the interest of the partners (as joint tenants) in partnership assets which were to accrue in the future through an ineffective survivorship clause, and in fraud upon the rights of the heirs at law who are justly entitled to an accounting under Illinois law. (Chapter 106½, Section 42, Illinois Revised Statutes)

Moreover, the facts in *Lynch* v. *Ilg* are dissimilar to the facts in the instant case. In the *Lynch* case the suit involved a son and grandson of the decedent with ample provision under a will, while in the case at bar the widow's right to inheritance is violated without any provisions at all for her or her child.

In *Hughes* v. *Bandy,* 336 Ill. App. 472, (Feb. 28, 1949) the Court held that until the Illinois Supreme Court had

passed on question presented, that Court was not bound to follow the decision of one of the other branches of the Appellate Court.

Still more recently in the case of *McCann* v. *Continental Casualty Company*, the First District, Appellate Court of Illinois (7 Ill. App. 2d 527) decided in direct conflict to a decision of the Appellate Court of the Fourth District, (*Landis* v. *New Amsterdam Casualty Co.*, 347 Ill. App. 560) in which leave to appeal had been denied by the Supreme Court, the court said:

> "However, the fact that the Supreme Court denies leave to appeal from a decision of the Appellate Court is merely an approval of the decision and is not necessarily an approval of the reasons therefor expressed in the opinion. *Bartosik* v. *Chicago R. & I. R. Co.*, 266 Ill. App. 28; *Marks* v. *Pope*, 289 Ill. App. 558; *Kelly* v. *Retirement Board, etc., of Chicago*, 292 Ill. App. 390."

Viewed in an aspect most favorable to defendant's contention, the joint tenancy and survivorship provision of the articles of co-partnership did nothing more than state the law in regard to partnership. The joint tenancy provision of the articles of co-partnership as construed by the final opinion of the Court of Appeals is repugnant to the law of partnership and as Judge Campbell pointed out, the most fundamental distinguishing element of a co-partnership is that "*there is no right of survivorship.*"

In 1921 the Illinois legislature abolished by statute all rights of survivorship as to personal property held in joint ownership. This is still the law in Illinois, except as to executors, trustees and bank accounts only, and where by will or other instruments in writing express an in-

tention to create joint tenancies in personal property with the right of survivorship. All other survivorships were abolished and joint tenants are deemed tenants in common. (Chap. 76, Sec. 2, Ill. Rev. Stat. 1951) This is still the law in Illinois. (*Lemen* v. *The Estate of Grote*, 203 Ill. App. 50; *Hay* v. *Bennett*, 153 Ill. 271)

The highest courts of Illinois have repeatedly held that in order to create a joint tenancy by contract, there must be present the four unities of interest, title, time and possession at the time of the making of the contract. (*Mustain* v. *Gardner*, 203 Ill. 284 (1903); *McCune* v. *Reynolds*, 288 Ill. 188; *Deslauriers* v. *Senesac*, 331 Ill. 437 (1928); *Re*: *Estate of Wilson*, 404 Ill. 207 (1949), Affirming 336 Ill. App. 18; *David* v. *Ridgely-Farmers Safe Deposit Co.*, 342 Ill. App. 96)

It is obvious that the four unities cannot exist and are repugnant to a mercantile partnership contract because of the constant change and flux in the partnership property and assets. Joint tenancy in personal property to exist at all must exist in the present. It cannot refer to future property.

In the leading case of *In Re Estate of Wilson*, 404 Ill. 207, the court, at page 212 of the opinion, said:

> "There is no principle of which we are aware which permits the transfer of undefined amounts of money, varying from time to time, by the mere designating of one party to a contract of renting as joint tenants with right of survivorship."

Again at page 214:

> "We might comment in passing that the latest pronouncement of this court affecting personal [property]. *Hood* v. *Commonwealth Trust and Savings*, 376 Ill. 413, indicates that the four unities must coexist to create a joint tenancy in personal property."

To the same effect is the case of *Kane* v. *Johnson*, 397 Ill. 116, where the court reiterated the necessity of the four unities in order to create a tenancy in common and in this regard, said:

> "The essential elements of a joint tenancy are that there should be unity of interest, unity of title, unity of time and unity of possession. To meet these requirements the several tenants must have one and the same interest accruing by one and the same conveyance commencing at one and the same time and held by one and the same undivided possession."

The applicable statute is Illinois Revised Statutes, Chap. 106½, Section 42, reading as follows:

> "When any partner retires or dies and the business is continued * * * he or his legal representative as against such persons or partnership may have the value of his interest at the date of death ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or at his option or at the option of the legal representative, in lieu of interest, *the profits attributable to the use of his right in the property of the dissolved partnership*" * * * (emphasis ours.)

The court in its final opinion overlooked entirely the express provision of Section 340, Chap. 3 of the Illinois Revised Statutes, which in substance provides an easy, simple and effective way of disposing of partnership estates. Said statute even dispenses with the requirement of opening an estate. All the defendant had to do within sixty (60) days after the death of his brother was to file a verified inventory of the partnership assets and pay the heirs their just share of the partnership assets.

The Articles of Co-partnership in the case at bar, unlike the agreement in the Ilg case, did not waive the accounting required by the Partnership Act. It therefore merely stated the law in regard to partnership assets; namely, that the title to partnership property rests in the surviving partner upon the death of the other partner.

The Court of Appeals' opinion disregarded the principle that all laws in existence when a contract is made enter into and form a part of it as fully as if they were expressly referred to or incorporated in its terms. (*Cook-Master* v. *Niero Steel Products, Inc.*, 339 Ill. App. 519; *Illinois Bankers Life Ass'n.* v. *Collins*, 341 Ill. 548)

In the last cited case, the court at page 552, states the principle of law clearly:

> "The basic rule of the construction of contracts and a material part of every contract is that all laws in existence when the contract is made necessarily enter into and form a part of it as fully as if they were expressly referred to or incorporated into its items. This principle embraces alike those which effect its validity, construction, discharge and enforcement. (Citing many authorities)."

III.

The questions involved fundamental rights of far-reaching importance.

The instant case involves the right of a widow and a minor son who were deprived of their lawful rights in the estate of the husband and father by the joint tenancy-survivorship provision of the Articles of Co-partnership.

The case takes on additional significance in view of the fact that the Court of Appeals was here interpreting a provision of the Uniform Partnership Act which has been enacted in almost every state of the union.

If this decision is permitted to stand instrumentalities purporting to create joint tenancies with the incident of survivorship in partnership property will be fraudulently used as a convenient means of defeating widows of their dower rights and to defeat the rights of widows and minor children of deceased partners of their rights of inheritance. The holding is not only inequitable and contrary to the law of partnerships but is of nationwide application and importance.

Also of importance in the administration of justice throughout these United States is the rule laid down in the final opinion of the Court of Appeals which permits a party to appeal from an interlocutory decree and not requiring him to raise previous error of the trial court which are determinative of all issues involved and which if sustained, would necessitate a dismissal of the action.

The instant case exempliflies the error in this rule, for here if the final opinion is correct the six years of litigation with its attending cost, would have been avoided, if the defendant had raised the defense of joint tenancy in either prior appeal.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A".

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 11321. OCTOBER TERM, 1954, APRIL SESSION, 1955.

BILLIE P. JONES, Formerly BILLIE P. SCHELLENBERGER, Administratrix, etc.,

Plaintiff-Appellee,

vs.

JAMES A. SCHELLENBERGER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 26, 1955.

Before DUFFY, *Chief Judge,* MAJOR and SWAIM, *Circuit Judges.*

MAJOR, *Circuit Judge.* The plaintiff, widow and Texas administratrix of the estate of Ralph D. Schellenberger and a citizen of Texas, brought this suit in the Northern District of Illinois against the defendant, James A. Schellenberger, a citizen of Illinois, brother of Ralph and surviving partner of an automobile retailing partnership which was dissolved by Ralph's death, for an accounting with respect to the affairs of the firm.

Ralph D. Schellenberger died July 1, 1945, and the complaint was filed October 14, 1948. Defendant's answer to said complaint was filed November 10, 1948, to which was attached a copy of the articles of co-partnership entered into between the decedent and the defendant, dated December 10, 1937.

(Appendix)

The partnership agreement provided, among other things, that the parties should "own the said business and partnership jointly, as joint tenants with the right of survivorship, and upon the death of either party hereto all right, title and interest shall vest immediately unto the surviving party. * * * In case of the death of either partner the whole of the assets or effects of the partnership shall accrue immediately to the surviving partner." (We shall hereafter refer to this as the "survivorship provision.")

After prolonged litigation, including two previous appeals to this court (196 F. 2d 852, and 201 F. 2d 29), with numerous references to a Master, a decree was entered September 27, 1954, approving in the main the report and supplemental report of the Master, dated respectively June 10, 1953 and August 21, 1953, in which it was adjudged and decreed that the plaintiff have and recover from the defendant the sum of $268,049.13, together with certain specified interest and costs. From this decree defendant appeals.

The sole reason urged for reversal is that under the "survivorship provision" all of the partnership property at the time of the decedent's death passed to the defendant and he became the sole owner thereof. This, so it is asserted, constitutes a bar to plaintiff's cause of action and requires a reversal with directions to dismiss the complaint. Defendant, in support of this contention, relies almost exclusively upon a decision of an Illinois Appellate Court, *Lynch* v. *Ilg*, 348 Ill. App. 545, in which the Illinois Supreme Court, on January 15, 1953, denied leave to appeal, *Lynch* v. *Ilg*, 413 Ill. 627. It appears that the Ilg decision is the first by an Illinois court construing and sustaining a partnership "survivorship provision." Defendant has attached to his brief a copy of the Ilg decision, it being reported only in abstract form. That decision, so far as the record discloses, was not called to the

attention of the Master or the District Court, although it was rendered November 25, 1952, long before the Master's report and almost two years prior to the entry of the decree appealed from.

We must first determine whether the defendant at this late date is entitled to invoke the pronouncement in the Ilg decision as a basis for reversal and, if so, whether it is controlling in the instant situation. On so many occasions during the course of these proceedings defendant has taken a position inconsistent with that now argued that we find it difficult to evaluate the record with a view of ascertaining if he has waived or is now estopped from relying upon the "survivorship provision." So far as we are able to ascertain, there was never at any time a pleading by the defendant which appropriately raised the survivorship defense, although it lurked in the copy of the contract attached to defendant's answer. In fact, the answer recognized that plaintiff was entitled to an accounting for, in response to plaintiff's allegation that defendant had refused to account, defendant alleged, "Defendant • • • denies that all of the assets of said partnership have been retained by this defendant, but states that he delivered and paid over to the use and benefit of the widow of the deceased, Ralph D. Schellenberger, at her request, in expenditures, advancement of cash, and in valuable property, a total of the sum of Four Thousand Two Hundred Thirty-nine Dollars and Sixty-nine Cents ($4,239.69)." The answer further asserted as an excuse for defendant's failure to account the lack of knowledge of plaintiff's appointment as administratrix.

The cases are numerous that under Rule 12(b) of the Federal Rules of Civil Procedure, an affirmative defense must be raised by answer or motion to dismiss. *Carter et al.* v. *Powell et al.*, 104 F. 2d 428, 430, cer. denied 308 U. S. 611; *Oedekerk et al.* v. *Muncie Gear Works, Inc.*, 179 F. 2d 821, 824; *Tornello* v. *Deligiannis Brothers, Inc.*, 180 F. 2d 553, 556. Notwithstanding, however, that the defense here

invoked was not appropriately raised by pleading, it was an issue considered and decided by the court adversely to the defendant. In so doing the court, on April 5, 1950, stated:

> "Having, therefore, established that the Act [Illinois Partnership Act] mandatorily creates a tenancy in partnership, it still remains to be determined whether or not a tenancy in partnership and a joint tenancy with right of survivorship may mutually coexist. That proposition must be answered in the negative for the reason that the most fundamental distinguishing element of the former is that there is no right of survivorship."

After reference to and report by a Master, the matter again came before the court on objections to the Master's report, and a decree was *entered September 20, 1951.* It is this decree which the District Court subsequently held and the plaintiff now contends was res adjudicata on the defense based upon the "survivorship provision." In this decree the court approved the recommendation of the Master (1) that the name of the plaintiff be changed to correspond with her married name, (2) that the motion of Noah J. LaReau to be substituted as a party-plaintiff be denied and (3) that certain minor heirs of decedent's estate be added as parties-plaintiffs. The decree contains numerous findings and conclusions relative to the partnership agreement and the relation existing between defendant and the decedent, including:

> "13. That during the operation of said partnership business, both before and after the death of Plaintiff's intestate, the partnership built and developed goodwill and franchise rights in selling to the public used and new automobiles, and that said goodwill became a partnership asset, entitling Plaintiff's intestate to share in the profits thereof, and

that upon the dissolution of said partnership, an account should be taken and the market value of said assets, including the goodwill and franchise rights thereof, should be ascertained and sold at its market value and distributed in accordance with the laws of the State of Illinois.

"14. That this Court, by an order entered on to-wit: April 5, 1950, had stricken from the defendant's answer the affirmative defense relating to partnership joint tenancy and right of survivorship because, the right of joint tenancy and the right of survivorship in partnership assets and property may not mutually co-exist by reason that the most fundamental distinguishing element of the tenancy in co-partnership is that there is no right of survivorship.

"15. That subsequently to the death of said Ralph D. Schellenberger, deceased, James A. Schellenberger, has paid plaintiff, Billie P. Schellenberger, various sums and delivered to her various articles of property, all of which should be included in the accounting hereinafter recommended."

(This last paragraph is based upon an admission in defendant's answer to the complaint, as heretofore noted.) The court decreed, among other things:

"That James A. Schellenberger, defendant, be and he is hereby required to account to said Billie P. Jones, formerly Billie P. Schellenberger, as Administratrix of the Estate of Ralph D. Schellenberger, deceased, on account of the partnership existing between said Ralph D. Schellenberger, deceased, during his lifetime, and said James A. Schellenberger, to the date of said account.

"That the cause be referred to Joseph F. Elward, a Master in Chancery, for the taking of an accounting of the partnership dealings by the said parties."

The Master in the instant proceeding held that the decree of September 20, 1951 was res adjudicata, citing *Delta Drilling Co. et al.* v. *Arnett,* 186 F. 2d 481, and *Gulf Refining Company, etc. et al.* v. *United States,* 269 U. S. 125. Defendant on the other hand cites numerous cases which hold that in a suit between partners a decree directing an accounting is not final, not appealable and not res adjudicata until the account is taken. The cited cases include *Latta* v. *Kilbourn,* 150 U. S. 524; *Guarantee Company* v. *Mechanics' Savings Bank and Trust Company,* 173 U. S. 582; *Mercantile Trust Co. of New York* v. *Chicago, P. & St. L. R. Co. et al.,* 123 Fed. 389, and the recent case of *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U. S. 176. Generally it may be said that if a decree provides solely for an accounting—in other words, grants no other relief to the plaintiff—it is not final and appealable, but if other affirmative relief is awarded to the plaintiff, the decree is final and appealable. It will be noted there is something more in the decree than a mere direction to account. For instance, it is adjudicated that the goodwill and franchise rights are partnership assets, that they are to be sold and the proceeds divided according to the laws of the State of Illinois. Moreover, plaintiff is required to account to defendant for property theretofore delivered by him to her. However, in the view which we take of the case, it becomes unnecessary to decide whether the decree of September 20, 1951, or any other decree entered by the District Court, is res adjudicata on the issue now raised in this court, for the reason, subsequently shown, that defendant by his acts and conduct has waived the right to raise such defense on the present appeal.

After April 5, 1950, when the court first held as a matter of law that the "survivorship provision" constituted no defense, and prior to the court's decree of Sept-

ember 20, 1951, in which the court held as a matter of law that its previous ruling on that point was res adjudicata, the defendant employed William L. Kelly, an attorney, to represent him in procuring the issuance of letters of administration in the Probate Court of Cook County, Illinois, upon the estate of Ralph D. Schellenberger, his deceased brother and partner.

For such purpose, the defendant, on September 11, 1950, more than five years after the death of Ralph, filed in the probate Court a petition praying such appointment. In such petition it was represented that the decedent left personal estate in the value of $2,500 and that his widow and minor child were his only heirs at law. Thereupon, Thomas J. Phelan was appointed administrator and on November 1, 1950, filed an inventory in which it was stated that the decedent left as his only personal estate "an undivided one-half interest in the partnership of James A. Schellenberger and Ralph D. Schellenberger." Successor-administrators were appointed, the last of whom was Noah J. LaReau. This administrator, on December 19, 1950, filed his appearance in the District Court and moved that he be substituted as a party-plaintiff. The court, on the recommendation of a Master to whom the matter had been referred, denied the motion for substitution, whereupon the Illinois administrator appealed to this court, which affirmed. (196 F. 2d 852.) The defendant was made a party in this court and entered his appearance. The same counsel who had been employed by the defendant to obtain the appointment of the Illinois administrator represented such administrator in the District Court as well as in this court on appeal, and was paid for his services by the defendant the sum of $1,400.

It is hardly open to question but that defendant is chargeable with all that transpired in the abortive attempt to have LaReau substituted as a party-plaintiff. At that time defendant evidently elected, and with design, not to

contest further the adverse portion of the decree relative to the defense based upon the "survivorship provision." This is evidenced by the fact that defendant solemnly represented to the Illinois Probate Court that the deceased partner, at the time of his death, was the owner of a one-half interest in the partnership property, in other words, a representation diametrically opposed to that now made, that the defendant is and has been at all times the sole owner. Moreover, defendant's effort to have the Illinois administrator substituted as a party-plaintiff was a clear recognition on his part of the validity of the court's decree which had directed an accounting. In fact, it was represented to the court at that time that the purpose of securing the substitution of an Illinois administrator was to protect Illinois creditors, of which defendant was one, he having filed a claim in the Probate Court against the decedent's estate. Thus, the legal effect flowing from the effort to substitute an Illinois administrator was in aid and not in derogation of the action for an accounting. Defendant's activity in seeking the appointment of an Illinois administrator under the circumstances related, for the purpose of conducting the suit for an accounting, was an abandonment or waiver of a defense based upon the "survivorship provision." This conclusion finds strong support in defendant's answer denying that he had refused to account and his allegation that he had delivered to plaintiff a portion of the partnership assets as found by the District Court. It is elementary that a party may waive a condition or stipulation made in his own favor. *Westinghouse Electric Corporation* v. *Bulldog Electric Products Co.*, 179 F. 2d 139, 146.

It is not too helpful and hardly necessary to cite or quote from numerous cases as to what constitutes waiver. In *Yates* v. *American Republics Corporation*, 163 F. 2d 178, the court stated (page 179):

"Waiver is the voluntary relinquishment or surrender of some known right. Its constituent elements are an existing right; knowledge of such right; and an intention to relinquish or surrender it. And one in possession of a right of that kind may effectively waive it by acts, conduct, declarations, acquiescence, or silence where duty requires that he speak."

See also *Westinghouse Electric Corporation* v. *Bulldog Electric Products Co., supra,* and *Hershberger* v. *United States,* 138 F. 2d 515, 517.

On April 29, 1952, while the appeal lastly discussed was pending in this court, plaintiff filed in the District Court a petition for the appointment of a receiver to take charge of the partnership assets and for the issuance of an injunction to restrain defendant from disposing of them. The petition, among other things, referred to the previous decree of the court directing the defendant account, as well as the previous decree denying substitution of the Illinois administrator and the appeal to this court. Defendant filed an answer denying petitioner was entitled to the relief sought, largely on the basis that only complete relief could be obtained by the parties, including the rights of creditors and heirs, in the Probate Court of Cook County, Illinois. The matter was referred to a Master, whose report, recommending that the relief be granted, was approved by the District Court over defendant's objection.

The decree of approval was entered August 8, 1952, and recites in detail the proceedings which had heretofore been had. Among other things the decree states:

"That on September 20, 1951, a decree was entered by this Court, wherein and whereby it was provided that plaintiff Billie P. Jones, formerly Billie P. Schellenberger, as administratrix of the Estate of Ralph D. Schellenberger, deceased, was entitled to an accounting from defendant, James A. Schellenberger, as to the assets of a certain partnership * * *."

The decree also recites that the defendant "has failed and refused to make any accounting of said partnership and has resisted this suit and plaintiff's claim therein for an accounting." Not only was the defendant by the decree enjoined from further disposing of partnership assets but it was directed that he should "immediately set over, transfer, assign and deliver to said Receiver any and all cash, credits, debts, effects, and other assets of every kind of the late partnership * * *." The court, referring to the issues previously raised by the defendant, again concluded as a matter of law:

> "* * * these issues were resolved against Defendant by this Court's decree of September 20, 1951. Defendant has not appealed from that decree: it is res adjudicata, and these questions are no longer open to defendant."

Defendant appealed from this decree, which was affirmed by this court (201 F. 2d 29). No question was raised in the lower court by pleading or otherwise, either before the Master or on objections to the Master's report, that plaintiff was not entitled to the relief then sought because she was without interest in the partnership assets. This is so notwithstanding that the issue now sought to be maintained, that is, that the defendant was the owner of all the partnership assets by reason of the "survivorship provision", would have constituted a bar not only to the appointment of a receiver and the issuance of an injunction but to all relief sought by the plaintiff. Such a defense, if sustained, would have ended the litigation. Notwithstanding that the defense was not raised in the lower court, defendant in this court in his statement of points to be relied upon stated:

> "The District Court erred in holding that there was any evidence to support the conclusion of law that Ralph D. Schellenberger at the time of his death had any interest in the assets of the partnership or profits attributable to it thereafter."

Defendant, however, did not argue the point in this court. Instead, he again urged that the District Court was without jurisdiction for the reason that the accounting proceedings should go forward in the State Probate rather than in the District Court.

This brings us to the much controverted issue as to whether defendant had a right to raise a defense to the petition for an injunction and the appointment of a receiver which culminated in the decree of April 29, 1952, the "survivorship provision" of the partnership agreement (assuming that it had not previously been waived). As already noted, this defense, if sustained, constituted a bar to all relief sought by the plaintiff, including her petition for the issuance of an injunction and the appointment of a receiver, and would have required a dismissal of her complaint. The defense, if sustained, would have ended the litigation. And it should be further noted that such a defense would have raised solely a question of law, untainted with any factual issue, and it was a question which the District Court was as capable of deciding then as at any time (in fact, it had decided the issue on two previous occasions) and which this court was as capable of deciding then as now, if it had been relied upon. Defendant head-notes his argument on this point thus: "This appeal affords to this defendant for the first time a right to this court's adjudication upon any phase of the substantive merits of this case." Confining the statement to the defense based upon the "survivorship provision," we do not agree. In our view, *the defense was available to him in the District Court and again on appeal to this court;* in fact, as noted, it was raised in this court but not argued.

The appeal being from an interlocutory order, it may be conceded that substantive rights cannot generally be raised or decided but must be left for future determination; however, there are numerous exceptions to this rule.

(Appendix)

At this point, we take note of defendant's supplemental brief, calling our attention to the recent case of *Seagram-Distillers Corporation* v. *New Cut Rate Liquors, Inc. et al.*, No. 11275, decided by this court April 4, 1955, which was here on appeal from an interlocutory order granting a preliminary injunction. Defendants contended that the law upon which the complaint was predicated was unconstitutional and this court held that neither the District Court nor this court was required to pass upon that substantive question. As authority for this holding we cited and quoted from *Mayo et al.* v. *Lakeland Highlands Canning Co. et al.*, 309 U. S. 310, 316. We think the *Mayo* case is distinguishable on the ground that the constitutional question sought to be raised was dependent upon a factual situation which had not been developed. Giving to defendant, however, all the benefit which may reside in our recent Seagram opinion, it does not follow that a Federal court may not consider and decide a question solely of law material to the proceeding in which an injunction is sought.

Any doubt on this score is removed by the decision of the Supreme Court in *Deckert et al.* v. *Independence Shares Corp. et al.*, 311 U .S. 282, 287, wherein the court, in discussing the power of a court of review on appeal from an interlocutory order, stated:

> "However, this power is not limited to mere consideration of, and action upon, the order appealed from. 'If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.'"

The *Mayo* case, decided almost a year previously, was not referred to. The following cases were cited in support of the above statement: *Meccano, Ltd.* v. *Wanamaker*, 253 U.S. 136, 141; *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275; *Metropolitan Water Co.* v. *Kaw Valley Drainage District*, 223 U. S. 519; *Mast, Foos & Co.* v. *Stover Mfg.*

Co., 177 U. S. 485; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518. We shall refer to some of the cases thus cited.

In the *Meccano* case, the court stated (page 141):

> "This power is not limited to mere consideration of, and action upon, the order appealed from; but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated."

In the *Eagle Glass* case, the court stated (page 280):

> "* * * the bill could not properly be dismissed upon appeal unless it appeared that the court was in possession of the materials necessary to enable it to do full and complete justice between the parties, and further, where 'upon the face of the bill there is no ground for equitable relief, the appellate court may finally dispose of the merits upon an appeal from an interlocutory order.' "

In the *Metropolitan* case, the court stated (page 523):

> "For, while at one time there was some difference in the rulings on that subject, it was finally settled by *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, that on appeal from a mere interlocutory order the Circuit Court of Appeals might direct the bill to be dismissed if it appeared that the complainant was not entitled to maintain its suit."

In the *Smith* case, the court, in discussing the purpose of permitting an appeal from a temporary order, stated (page 525):

> "* * * to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it."

Numerous other cases support the exception to the general rule that the merits of the case are not involved in an

appeal from a temporary order. In *In re Tampa Suburban Railroad Company,* 168 U. S. 583, the court stated (page 588):

> "• • • the appeal provided for may be taken, and carries up the entire order, and the case may, indeed, on occasion, be considered and decided on its merits."

In *Cumberland Telephone & Telegraph Co.* v. *City of Memphis et al.,* 200 Fed. 657, 658, the Court of Appeals held that it would decide a legal question which was determinative of the propriety of granting or withholding an injunction. In *Pang-Tsu Mow et al.* v. *Republic of China,* 291 F. 2d 195, 198, cer. denied 345 U. S. 925, the Court of Appeals held that in reviewing an order for a preliminary injunction the court should inquire into the jurisdiction of the District Court and the adequacy of the complaint, and stated:

> "• • • for no preliminary injunction may stand if the complaint itself stand."

In *Mitchell* v. *Maurer etc.,* 293 U. S. 237, 241, the court held that an order appointing a receiver must be set aside upon disclosure by the record that there was no diversity of citizenship. In *North* v. *Transit Inv. Corporation et al.,* 132 F. 2d 938, on an appeal from an order appointing a receiver and the issuance of an injunction, the court stated (page 944):

> "Since the appeal is properly before us we have the duty to determine the jurisdiction of the court below over the parties and the subject matter of the litigation. • • • The equity of the complaint, the relief granted and all other issues are before us in the appeal. [Citing cases.]"

In all of these cases recognizing the exception to the general rule, there was involved only a question of law which, if decided favorably to the defendant, would end the litigation. As we have noted, there was a question of law

in the instant case, injected therein by the defendant, which, if decided favorably to him, would have required the same result. We think the authorities to which we have referred justify the conclusion that he could have raised it as a defense to the petition for the appointment of a receiver and the issuance of an injunction (providing it had not been previously waived), and that the defense, if sustained, would have constituted a bar to all relief on the part of plaintiff, requiring a dismissal of her complaint.

Defendant apparently recognizes that there are exceptions to the general rule. In his brief it is stated, "Where a complaint states absolutely no cause of action whatsoever, it of course cannot justify an interlocutory injunction, temporary receiver, or any other interlocutory relief. A declaration to that effect is necessarily a pronouncement on the merits." We think that a defense which sets forth as a matter of law a bar to the cause of action comes within the same category. If a court is permitted, as conceded, to examine the complaint to determine if as a matter of law a cause of action is stated, what reason is there for its not examining a defense for the purpose of determining if as a matter of law the litigation must end? To hold that a court may not do so is to treat with disdain logic and common sense.

It is, therefore, our conclusion that the defendant by his course of conduct relative to the decree of September 20, 1951, abandoned the issue which he raises on this appeal. And this is so irrespective of whether that decree was res adjudicata. Moreover, any doubt which may exist on this score is of little consequence in view of the fact that defendant had a clear right when he appealed from the decree of August 8, 1952, to raise and obtain an adjudication upon the present issue. Another indication that defendant by his then counsel recognized that the present issue had been either waived or finally adjudicated resides

in the fact that the Illinois Appellate Court decision now so heavily relied upon, rendered almost two years prior to the decree appealed from, was not cited or called to the attention of the District Court. It was only after defendant had procured different counsel that it was sought to relitigate an issue which in our judgment had long been laid to rest, *and it was in this court for the first time that reliance was placed upon the Illinois Appellate Court decision.* We do not intend to be critical of either past or present counsel. The latter has strived earnestly to overcome the obstacles presented by the record which he as we, must take as it was made. In our judgment, however, he has not succeeded in so doing.

We need not cite authority for the proposition that Illinois law as announced by an Illinois Appellate Court is controlling if applicable and appropriately raised. In the view which we take, however, we find no occasion to determine the applicability of the pronouncement contained in *Lynch* v. *Ilg*, 348 Ill. App. 545.

The decree appealed from is

AFFIRMED.

DUFFY, *Chief Judge*, dissenting.

Plaintiff's husband died on July 1, 1945. At the end of that month, the value of the partnership assets was only $13,186.33. The defendant, as surviving partner, continued to operate the business, relying upon the terms of the partnership agreement. This suit was not filed until 1948. Defendant has now been ordered to account to plaintiff for $268,409.13 because of profits earned by the business after the date of defendant's brother's death. This result is in spite of the fact that plaintiff's husband signed formal articles of partnership which provided that the partners should "own the said business and partnership jointly, as joint tenants with the right of survivorship, and upon the death of either party hereto all right, title and interest shall vest immediately unto the surviving partner." The

partnership agreement also provided "in case of the death of either partner the whole of the assets or effects of the partnership shall accrue immediately to the surviving partner." The question that should be decided by this Court is whether such provisions are valid under Illinois law. I think it unfortunate that this important controversy should be decided upon the technical ground of waiver.

Fourteen months after the trial court's original decree, the appellate court of Illinois for the First District decided the case of *Lynch* v. *Ilg*, 348 Ill. App. 545. Only an abstract of the opinion was printed. Neither the Master nor the District Court had knowledge of this State Court decision prior to making the decisions which are now before us. Apparently former counsel for defendant did not know of this decision or its import, otherwise the attention of the District Court would have been directed to it.

Lynch v. *Ilg* held that contracts whereby the surviving partner accedes to all of the partnership assets free of any obligation either to account to the deceased partner's representative, or to pay any consideration in lieu of an accounting, does not contravene any provision of Illinois law. On January 15, 1953, the Illinois Supreme Court denied leave to appeal, *Lynch* v. *Ilg*, 413 Ill. 627. If the rule of *Lynch* v. *Ilg* applies to the case at bar, as I think it does, we should be governed accordingly.

We are bound to follow the decision of an intermediate appellate court "unless we are convinced by other persuasive data that the highest court of the State would decide otherwise". *West* v. *A T & T Co.* 311 U. S. 223, 237. We have no information that the Illinois Supreme Court would disapprove the rule announced in *Lynch* v. *Ilg*. A denial to appeal to the Illinois Supreme Court is unlike a denial for a petition for certiorari to the United States Supreme Court. The denial for leave to appeal attests that the Illinois Supreme Court thought the result of the intermediate court decision was correct. *Walters* v. *Walters*,

409 Ill. 298. There was only one question in *Lynch* v. *Ilg*. The Illinois Supreme Court approved the result, namely, the contracts there considered were valid.

I do not think that the earlier decision of the trial court or the previous decisions of this Court are res judicata. In *Latta* v. *Kilbourn*, 150 U. S. 524, the Supreme Court held that in a suit for a partnership accounting a decree deciding that transactions are within the scope of the partnership and directing the taking of an accounting is not final and not appealable and is not res judicata until the accounting has been had.

I realize that defendant, guided by previous counsel, has taken inconsistent positions, but in these modern days when a defendant may plead in the alternative and may plead inconsistent defenses (Rule 9 (e) Federal Rules of Civil Procedure), such inconsistencies should not be fatal nor any reason for not deciding a controversy upon the merits. Furthermore, I do not think the defendant should be held to have waived a valid defense based upon a controlling State decision which neither the trial court nor the Master nor the defendant's attorneys knew had been handed down. I would reverse.

APPENDIX "B".

IN THE MATTER OF THE ESTATE OF KAROLINA ILG, deceased.
THOMAS ILG LYNCH,

Appellant,

vs.

HENRY J. ILG,

Appellee.

Appeal from Superior Court
Cook County

Mr. Presiding Justice Robson Delivered the Opinion of the Court.

This is an appeal from an order of the Superior Court of Cook County denying the petition of Thomas Ilg Lynch, an heir legatee and devisee of Karolina Ilg, deceased, to compel Henry J. Ilg, the executor of her will, also an heir, legatee, devisee of said decedent, and the surviving partner of a partnership existing between Ilg and the decedent at her death, to file a partnership inventory in the estate.

Lynch filed a petition in the Probate Court of Cook County, Illinois, seeking to compel Ilg, as executor, to list and inventory, in the estate of the deceased, the assets of the partnership. The Probate Court entered an order dismissing the petition and an appeal was taken to the Superior Court. An amended petition was filed in the Superior Court seeking the same relief. Ilg, individually and as executor, filed his answer. After hearing, the order appealed from was entered. The issues of law in the Probate and Superior Court were the same.

The facts of the case are that the decedent died testate on August 6, 1947, leaving her surviving Ilg, her son, and Lynch, her grandson, as her only heirs at law and next of kin. The will of the decedent was probated on October

22, 1947, and Ilg was appointed executor of said will, duly qualified, and is now acting as such executor. By her will the decedent made certain specific bequests of personal and real estate, and all other property she devised by a residuary clause to Ilg and Lynch, share and share alike. On December 29, 1941, the decedent and her son Ilg, both of whom had been conducting a floral business at Winnetka, Illinois, entered into a written partnership agreement to carry on the business. The articles of partnership contained the usual provisions fixing the rights and duties of the partners, and concludes with the following provision, the construction of which raises the points of issue for this appeal.

"This partnership shall continue for and during the joint lives of the parties, and upon the death of one the survivor shall ipso facto be and become the sole owner of the entire partnership business and assets, including all cash on hand or in bank, accounts and bills receivable, without any obligation of any nature to pay the estate, executors or heirs of the deceased partner any consideration therefor, it being the intention that the death of a partner shall immediately terminate all right, share, interest and privilege of such deceased partner, his heirs, executors, administrators or assigns in and to said business, partnership and concern and all the assets thereof, as completely to all intents and purposes as if he or she had never been interested therein, and the surviving partner shall have all and every right of sole ownership thereof and therein, including the right, if desired, to continue use of the name Henry Ilg Florists, and any other name or designation which the partnership may have used, as the name of, or in connection with, said business: provided, however, that nothing contained herein shall abridge the right of the parties to terminate their partnership during their joint lives by mutual agreement, and provided also that upon the death of a partner the assets of the business shall remain liable for all the debts and obligations of said business."

Lynch contends that this clause of the partnership agreement is void as in violation of the Joint Rights and Obligations Statute abolishing the right of survivorship in personal property, Ill. Rev. Stat. 1951, ch. 76, sec. 2, and therefore Ilg, as executor, should inventory the partnership assets. Ilg contends that this section of the statute has no application to provisions of a partnership agreement but that it is governed by the express provisions of the Uniform Partnership Act, Ill. Rev. Stat., 1951, ch. 106½, sec. 25 (1), (hereinafter called the Act), which provides that.

"A partner is a co-owner with his partners of specific partnership property holding as a tenant in partnership." and sec. 25 (2) (d), which provides:

"On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative."

The partnership contract in question by its terms was dissolved by the death of the decedent. Sections 40 and 43 of the Act provide the method for determining the assets and liabilities of the partnership and recognize that partners may enter into an agreement for the disposition of the partnership property upon its dissolution. Death dissolves the partnership, and therefore a reading of the language of these two sections makes it apparent that the partners could by a separate agreement dispose of the property in event of death. Is this a testamentary disposition of the assets of the partnership that violates the Joint Rights and Obligations Statute? This is a case of first impression in Illinois.

(*Appendix*)

We find two cases interpreting similar statutory provisions in other jurisdictions. The first, *In Re Karlinski's Estate,* 38 N. Y. S. 2d 297 (1942), a partnership agreement provided that in case of the death of either of the partners prior to the termination of the partnership, the surviving partner should become the sole owner of the partnership. The court upheld the provision on the grounds that it was a fair agreement entered into by the partners as to the disposition of the partnership property in the event of the death of one of the partners. The terms of the agreement were made by those familiar with the character and value of the property and were considered by them to be a just arrangement for the disposition of the partnership property. There having been a valid consideration for the agreement, the court held that it was not a testamentary disposition. Similarly, in the second, in the case of *McKinnon* v. *McKinnon,* 56 Fed. 409 (1893), the article of partnership between an uncle and a nephew for the practice of medicine provided that in the event of the death of the senior partner, leaving no immediate family, all partnership assets should pass to the junior partner. The court held that there was a good consideration for the contract and that it was not a testamentary disposition but was enforceable in equity.

Applying these decisions we find that Ilg, the surviving partner, contributed a portion of the partnership assets. He agreed to and did supervise and operate the business throughout the life of the partnership. Had he been the first to die, all of the partnership assets would have become the property of the decedent. The agreement was reciprocal and made by parties familiar with the character and value of the property. These facts established the consideration for the contract. The parties considered the terms to be a just arrangement for the disposition of that partnership property and agreed to abide by its terms until the death of one of the partners. The title of the two partners in the partnership assets was a tenancy in partnership. The incidents of this tenancy are

defined by Sec. 25 (1) and (2) (d) of the Act. One of these is survivorship; that is, the Act expressly provides that title as such to the assets of any partnership automatically passes upon the death of a partner to the surviving partners. (See Uniform Laws Annotated, Vol. 7, p. 144, note of commissioners.)

Ilg as surviving partner held title to the partnership property subject to the provisions of Sec. 25 (2) (d) of the Act. There was no title in the decedent. The effect of the agreement set forth was merely to waive the right to an accounting, which the estate of decedent would otherwise have. A contract made between living persons upon good consideration even though the contract provides as one of its terms that title to property shall pass to another upon the death of one of the parties to the contract, is recognized in Illinois. *Mathews* v. *Mathews*, 86 Ill. App. 654; *Owings* v. *Lehman*, 190 Ill. App. 432; *O'Connell* v. *United States*, 37 F. Supp. 832. Ilg, by performing his part of the contract and managing the business throughout the life of the partnership, furnished the full stipulated consideration for his acquisition of the partnership assets. The agreement comes clearly within the law enunciated in *In Re Karlinski's Estate*, 38 N. Y. S. 2d 297 (1942) and *McKinnon* v. *McKinnon*, 56 Fed. 409 (1893). We are of the opinion such provision is expressly recognized and authorized by the Act and is not in violation of the Joint Rights and Obligations Statute.

The Joint Rights and Obligations Statute has no application in this case. It is concerned with defining the character of the ownership or title, and the incidents of such title, where two or more persons possess some common interest in personal property, but not as partners under a written agreement supported by a consideration. The cases cited by Lynch involve the interpretation of this statute and are not concerned with cases relating to partnerships and the interpretation of the Act. They, therefore, are not in point.

Judgment affirmed.

Schwartz and Touhy, JJ; concur.

APPENDIX "C".

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 10696. OCTOBER TERM, 1952, JANUARY SESSION, 1953.

BILLIE P. JONES, Formerly BILLIE P. SCHELLENBERGER, Administratrix of the Estate of RALPH D. SCHELLENBERGER,

Plaintiff-Appellee,

vs.

JAMES A. SCHELLENBERGER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 16, 1953.

Before MAJOR, *Chief Judge,* DUFFY and LINDLEY, *Circuit Judges.*

MAJOR, *Chief Judge.* A phase of the suit out of which the instant controversy arises was before this court in *Jones* v. *Schellenberger et al.,* 196 F. 2d 852. We refer to our opinion in that case for details relative to the origin and nature of the case. As there shown, plaintiff as the administratrix of the estate of her deceased husband, Ralph D. Schellenberger, brought suit against James

A. Schellenberger, the instant defendant, for a partnership accounting. Jurisdiction rested upon diversity of citizenship, with the requisite amount involved. The matter was referred to a Master and, after the defendant learned of a likely adverse decision, he petitioned and obtained the appointment of an administrator in the Probate Court of Cook County. The Illinois administrator then petitioned the District Court for leave to be substituted as a party-plaintiff. This Petition for leave to substitute was denied by the District Court, which denial was affirmed by this court, as shown by the above cited case.

Subsequently, plaintiff petitioned the District Court for an order appointing a receiver to take charge of the partnership assets and for an order restraining the defendant from disposing of such assets or any money which he had received from the sale of such assets. The matter was referred to a Master, a hearing was held and a report made recommending that a receiver be appointed and an injunction issued. Defendant's objections to such report were overruled and an order entered in conformity with the recommendations of the Master. Defendant appeals from this order.

Defendant appears to argue two propositions, (1) *that the court was without jurisdiction of the subject matter, and* (2) *in any event, that the order appointing a receiver and providing for an injunction was improvident.* We think there is not a scintilla of merit in either contention.

The argument as to jurisdiction appears to *be an afterthought.* No such question has heretofore been raised; in fact, the jurisdiction of the court was recognized by seeking to have the Illinois administrator substituted as a party-plaintiff. Defendant cites cases in support of his contention that the question of jurisdiction can be raised at any stage of the proceeding. We, of course, recognize

this principle but it is without application here. There can be no doubt but that the District Court acquired jurisdiction of both the parties and the subject matter. Although it is not plain, it appears to be defendant's position that such jurisdiction was lost upon the subsequent appointment of an Illinois administrator. No case is cited which supports this contention and we know of none. Of course, if the Illinois administrator had been appointed previous to the commencement of the instant suit, a different question might be presented, one, however, which there is no occasion to discuss or decide. In fact, it appears that the procurement by defendant of the appointment of an Illinois administrator was not for the purpose of protecting Illinois creditors but, as we previously observed (page 854), "so that the accounting might proceed with a friendly adversary." As to the argument that the Illinois creditors are entitled to protection, we reiterate our previous statement (page 855), "If appellant as the Illinois administrator has any interest in the accounting which defendant has been ordered to make, for the purpose of protecting Illinois creditors or for other good reason, we have no doubt but that the court upon a proper showing would permit intervention and what we have said is without prejudice to any right he may have in this respect."

Further, we are of the view that the order appealed from was properly entered. At the hearing before the Master, it was shown that defendant had sold the partnership assets or a portion thereof to one Joseph Eisenberg for the sum of $65,000. In connection with this sale, he executed a bill of sale, an affidavit under the Bulk Sales Law of Illinois in which he stated that the property was his and that there were no unpaid creditors, and assigned leases of premises whereon the partnership business had previously been conducted. This sale was made while a decree for an accounting was in effect, without notice to the Master, court or the plaintiff. After this

sale was made, defendant appears to have left the jurisdiction of the court; *at any rate, he was not present at the hearing before the Master and his own counsel stated that he did not know his whereabouts.* There is sufficient reason to believe, both from the instant and the previous record, that defendant was studiously attempting to thwart the accounting which he was obligated by court decree to render.

Under the circumstances shown, the court could not well have done otherwise than enter the order complained of. Certainly defendant is in no position to complain of a requirement that the assets of the partnership be preserved under the custody and control of the court until such time as their ownership is adjudicated.

The order appealed from is

AFFIRMED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No.

BILLIE P. JONES, formerly BILLIE P. SCHELLENBERGER, Administratrix of the Estate of RALPH D. SCHELLENBERGER, Deceased,

Petitioner,

vs.

JAMES A. SCHELLENBERGER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

Petitioner seeks review of the decision of the Court of Appeals of September 6, 1955, but does not attach a copy of that opinion to her petition in conformity with the provision of this Court's Rule 23. We therefore print the full text of the opinion as Appendix I to this brief. The opinion is reported in 225 F (2) at pages 784 to 795.

The earlier opinions of the Court of Appeals are cited in the body of the petition but are not cited at the commencement thereof as required by this Court's Rule 23.

Those opinions are attached to the petition. The Court's opinions in two earlier appeals in this litigation will be found at 196 F (2) 852 and 201 F (2) 29.

Statement of the Case.

As we have noted under the heading "Opinions Below", the petition for *certiorari* does not have attached to it a copy of the opinion of the Court of Appeals of September 6, 1955, which is the opinion of which petitioner seeks this Court's review. Nor does the petition even advert to, much less does it quote or discuss, the statements in that Court's unanimous opinion of the considerations that constrained it to grant rehearing in this case.

In the opinion of the Court of Appeals of May 26, 1955, which is the opinion superseded by the present opinion, that Court had said (Appendix to Petition, pp. 39-40):

> "Another indication that defendant by his then counsel recognized that the present issue had been either waived or finally adjudicated resides in the fact that the Illinois Appellate Court decision now so heavily relied upon, rendered almost two years prior to the decree appealed from, was not cited or called to the attention of the District Court."

Recognizing error of fact in this statement, the Court said in its opinion of September 6, 1955 (Appendix I to this brief, 225 F (2) 784, at pp. 786-7):

> While we need not offer any excuse for reaching what we now think was an erroneous conclusion, it is perhaps pertinent to note that we labored under the impression that the Lynch decision was not called to the attention of the Master or the District Court. In

fact we stated, 'Another indication that defendant by his then counsel recognized that the present issue had been either waived or finally adjudicated resides in the fact that the Illinois Appellate Court decision now so heavily relied upon, rendered almost two years prior to the decree appealed from, was not cited or called to the attention of the District Court.' This erroneous statement, relied upon to fortify our conclusion that the defendant had waived the survivorship defense, was due to the fact that we examined only the printed record, which did not contain either the Master's report or the opinion of the District Court rendered on defendant's objections to the Master's report and upon which was predicated the decree from which the appeal comes. However, the original transcript of the record contains a copy of the Master's report and the opinion of Judge Campbell, together with the decree. Both the Master's report and the court's opinion disclose that the survivorship issue was heavily relied upon by the defendant and that it was thoroughly considered, discussed and decided adversely to the defendant. Moreover, plaintiff did not raise before the Master or the District Court the issue of waiver by defendant. As a matter of fact, no such issue was raised by the plaintiff in this court, although it was incidentally referred to in her brief."

Save for petitioner's surprising omission of any allusion to the grounds upon which the Court of Appeals granted rehearing, petitioner's Statement of the Case is in no material respect false or inadequate. However, we deem it unclear and unnecessarily discursive.

All of the facts necessary to a consideration of the questions raised by petitioner may be thus tersely stated:

Plaintiff, widow and Texas Administratrix of Ralph Schellenberger, brought this Brief against the defendant, a resident of Illinois and surviving brother of Ralph, this suit for an accounting with respect to the affairs of an automobile partnership that had subsisted until Ralph's death.

In the defendant's answer to the plaintiff's complaint, he set forth the full text of the articles of partnership. (Tr. 9.)

Those articles contained, *inter alia*, the covenants that the brothers owned the business

> "as joint tenants with the right of survivorship, and upon the death of either party hereto, all right, title and interest herein shall vest immediately unto the surviving partner." (R 10.)

and that

> "In case of the death of either partner, the whole of the assets or effects of the said partnership shall accrue immediately to the surviving partner." (R 12.)

At the time that the plaintiff's complaint and the defendant's answer were filed, there was a conflict in the decisions of other states and no decision of the Illinois Supreme or Appellate Courts upon the question of State substantive partnership law:

> ARE PROVISIONS IN ARTICLES OF INCORPORATION THAT UPON THE DEATH OF A PARTNER, THE SURVIVING PARTNER OR PARTNERS SHALL TAKE THE ASSETS FREE OF ANY OBLIGATION TO ACCOUNT TO THE PERSONAL REPRESENTATIVE OF THE DECEASED PARTNER VALID OR INVALID AS A MATTER OF STATE LAW?

The District Court, without the guidance of Illinois authority upon this question, adopted the view that such provisions were invalid and struck the defendant's assertion of these covenants as a defense to the plaintiff's suit. His language embodying this ruling is correctly reproduced at pages 10 and 11 of the petition and will not be repeated.

On September 20, 1951, the district court entered a judgment (termed through this litigation a "decree") again rejecting defendant's assertion of the exonerative provisions of the contract as a defense (Tr. 64) and directing respondent to account to petitioner. (Tr. 65-6). *Now this decree did not grant petitioner any final relief.*

Petitioner vigorously contended below but appears to have abandoned the contention here that this decree, which merely directed an accounting, was *res judicata*. The presently standing opinion of the Court of Appeals rejects that contention in the light of this Court's decision in *Latta* v. *Kilbourn*, 150 U. S. 524, which holds that decrees that do no more than direct an account with respect to a partnership are not final, not appealable and not *res judicata*.

On November 25, 1952, fourteen months and five days after the trial court's original decree directing an accounting, the Appellate Court of Illinois for the First District decided the case of *Lynch* v. *Ilg*, abstract opinion published only, 348 Ill. App. 545, opinion reprinted in full, Appendix C to the instant petition. In this case the Appellate Court held that provisions whereby a surviving partner is to take all of the partnership assets free of any duty to account to the representative of the deceased partner is not contrary to the public policy of Illinois. The Illinois Supreme Court denied to leave to appeal 413 Ill. 627. In the present opinion of the Court of Appeals in this case, that Court recognizes that denial of leave to appeal by the Supreme Court of Illinois, unlike denial of *certiorari* by this Court, imports approval of the Appellate Court's decision. The present opinion of the Court of Appeals in this case quotes the following language from *Walters* v. *Walters*, 409 Ill. 298:

> "The denial of leave to appeal, then, attests that this court [the Illinois Supreme Court] thought the result was correct and proper under the facts there presented."

The only question presented in the *Lynch* case was that of the validity of "survivorship without accounting" provisions in articles of partnership. Hence the Court of Appeals held that the Illinois Supreme Court's denial of leave to appeal in the *Lynch* case represented that Court's adjudication that such contracts do not contravene Illinois' public policy.

After the rendition of the decree directing respondent to account to petitioner and after the decision in the *Lynch* case, respondent did indeed prosecute two intermediate appeals to the Court of Appeals, each of which resulted in a decision of that Court adverse to that of respondent. The first of these appeals was from an order of the district court denying the motion of an Illinois administrator, whose appointment respondent had procured, to substitute himself for petitioner, a Texas administratrix, as plaintiff. This order was affirmed. *Jones* v. *Schellenberger*, 196 F (2) 852. The second appeal was from an order appointing a receiver at petitioner's instance. This order was also affirmed. *Jones* v. *Schellenberger*, 201 F (2) 29.

The first of these appeals only required the Court of Appeals to decide who was the proper plaintiff, the Texas administratrix or the Illinois administrator, and the second of them required the court only to decide whether a *custodial* (not a liquidating) receiver should be installed during the pendency of the accounting proceedings.

In its present opinion the Court of Appeals has recognized in substance that while it had discretion to entertain a contention, had the contention been made, that the articles of partnership constituted a defense to respondent's suit under the teachings of *Lynch* v. *Ilg*, it was not obliged to do so.

Therefore, reasoning in substance that since respondent had no right to an adjudication upon that substantive issue, even though he might have procured such a decision in the exercise of the court's discretion, it refused to apply the doctrine of *res judicata* to respondent's two intermediate appeals.

Moreover, the Court of Appeals said in its present opinion (Appendix I, *post*, 225 F (2) 784 at 790):

> "In *Southern Railway Company* v. *Clift*, 260 U. S. 316, 319, 43 S. Ct. 126, 67 L. Ed. 283, the court, with reference to a prior ruling in the same case, stated:

" 'The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and *res judicata*. One directs discretion; the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission.'

"In *Messinger* v. *Anderson*, 225 U. S. 434, 444, 32 S. Ct. 739, 740, 56 L. Ed. 1152, the court stated:

" 'In the absence of statute the phrase, "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. (Citing cases.)'

"Furthermore, it is the duty of federal courts at any state in the course of a proceeding to give effect to state law. In *Huddleston* v. *Dwyer*, 322 U. S. 232, 236, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246, the court quoted from its previous decision in *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 543, 61 S. Ct. 347, 85 L. Ed. 327, as follows:

" 'Until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.'

"Under this pronouncement it appears plain that a District court as well as this court is obligated to give effect to any change in state law made during the course of a proceeding, and we perceive no reason to doubt but that the obligation persists even though it requires further consideration of a question previously decided by a decree which under some circumstances may be regarded as final."

The Court of Appeals did hold, in response to a virtual concession by respondent's present counsel, that respondent, although not obliged to account to petitioner, had been guilty of reprehensible conduct in attempting to procure an amicable Illinois administrator and in conduct entail-

ing the necessity for and expense of a receiver. It taxed all of the costs against respondent and virtually directed the district court to do likewise. Respondent does not challenge the propriety of this part of the Court of Appeals' opinion. Indeed, as the opinion discloses, respondent's counsel practically invited the taxing on rehearing of the costs against respondent even though he should be the prevailing party.

The Court of Appeals said (Appendix I, *post*, 225 F. (2) 784, at pp. 794-5):

> "Defendant's counsel, who has represented him only on this appeal, appears to sense the situation. His petition for rehearing contains the following headnote, 'Any actual imposition upon Mrs. Schellenberger because of the reversal by this Court can be corrected by this Court's or the District Court's apportionment of costs." The petition continues: '* * * If this Court feels that she has been substantially prejudiced by the expense incidental to the defendant's appeals from the interlocutory orders or has otherwise suffered because this litigation has been unnecessarily protracted, it is within this Court's power to rectify that injustice by apportionment of the costs, expenses and attorneys' fees, including the taxing of all of the expenses of the receivership and such other items as may appear to the Court to be just, against the defendant.' We appreciate this candid concession on the part of defendant's counsel. In our view, defendant should be required to pay all costs and expenses incurred in this proceeding, and all costs in this court are taxed to him. We think the taxation of costs other than those incurred in this court is a matter for the District Court."

The Questions Presented.

Petitioner's Statement of the Questions Presented is correct.

ARGUMENT.

I.

The respondent did not waive the defense of "the survivorship without accounting" provisions of the articles of copartnership. Nor was any adjudication of the District Court or of the Court of Appeals on respondent's two prior appeals res judicata.

The passage from the opinion of the Court of Appeals, quoted in the Statement of the Case, *ante,* which is not even mentioned, much less criticized, by petitioner is fully responsive to petitioner's contention that respondent waived the defense of the articles of partnership in the District Court. He pleaded them in the first pleading that he filed, his answer to the plaintiff's complaint (Tr. 7). The trial court struck that defense. An order that in effect sustains a demurrer to one of several defenses is of course not final and is not appealable. As the opinion of the Court of Appeals points out, he pressed the decision of the *Lynch* case upon the District Court vigorously.

So much for the contention that respondent abandoned his defense in the District Court.

The contention that the decision of the Court of Appeals on respondent's two intermediate appeals were *res judicata* or, alternatively, that respondent waived the defense of the articles of copartnership by not pressing that defense on these two intermediate appeals, are likewise answered by the present opinion of the Court of Appeals.

A

Petitioner abandons here the contention that the District Court's decree directing the taking of an accounting was res judicata.

As appears from the present opinion of the Court of Appeals, petitioner vigorously contended in that court that the decree of the District Court directing the taking of an accounting was *res judicata*. The present opinion of the Court of Appeals declares this case to be indistinguishable from *Latta* v. *Kilbourn*, 150 U. S. 524. That case, precisely like the instant case, was a suit for a partnership accounting. In that case, precisely as in the instant case, the question was whether the defendants were required to account for certain assets and profits, the question turning, as the substantive question in this case turns, upon a construction of written articles of partnership. In that case, as in this case, no appeal was taken from the decree directing an accounting. In that case, as in this case, it was contended by the plaintiff that the decree directing the accounting was *res judicata*.

This Court rejected the contention.

Since petitioner neither distinguishes nor asks this Court to overrule the *Latta* case, we assume that petitioner abandons her contention that the decree directing the taking of an accounting was final, appealable and *res judicata*.

If that contention is before this Court, we rely upon this Court's decision in the *Latta* case and the language of the present opinion of the Court of Appeals as our response to that contention.

B

Neither of the two prior appeals to the Court of Appeals entitled either of the parties to a ruling upon the question of the validity of the exonerative provisions of the articles of partnership. Therefore neither decision could be res judicata.

Petitioner argues that respondent could have raised his substantive contention that the exonerative articles of partnership presented a complete defense to the petitioner's suit, that the Court of Appeals could have decided that question and that therefore the former appeals are *res judicata.*

But petitioner overlooks the important consideration that while a federal reviewing court may in its discretion dismiss a suit on the merits where it affirmatively appears that the plaintiff has no case, *it is not obliged to do so and neither party has a right to have it do so!* Disposition of the merits upon interlocutory appeals is discretionary, not obligatory, upon a reviewing court.

We are aware of no case (certainly petitioner cites none) that requires a litigant to canvass the merits upon an interlocutory appeal when he is not entitled to a decision upon the merits but at most can hope for a favorable exercise of the reviewing court's discretion to dispose of the case upon an interlocutory appeal.

However, even if respondent could have insisted upon a decision upon the merits on either or both of his previous appeals, the doctrine of *res judicata,* properly so called, does not apply to successive decisions in the same case, as distinguished from earlier adjudications in actions collaterally attacking them.

The language of the Court of Appeals already quoted in the Statement of the Case, is repeated for the Court's convenience, immediately below, is dispositive of this point. (Appendix I, *post*, 225 F. (2) 784 at 790.)

> "In *Southern Railway Company* v. *Clift*, 260 U. S. 316, 319, 43 S. Ct. 126, 67 L. Ed. 283, the court, with reference to a prior ruling in the same case, stated:
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> " 'The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and *res judicata*. One directs discretion; the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission.'
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> "In *Messinger* v. *Anderson*, 225 U. S. 434, 444, 32 S. Ct. 739, 740, 56 L. Ed. 1152, the court stated:
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> " 'In the absence of statute the phrase, "law of the case", as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. (Citing cases.)'
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> "Furthermore, it is the duty of federal courts at any state in the course of a proceeding to give effect to state law. In *Huddleston* v. *Dwyer*, 322 U. S. 232, 236, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246, the court quoted from its previous decision in *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 543, 61 S. Ct. 347, 85 L. Ed. 327, as follows:
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> "'Until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.'
>
> "Under this pronouncement it appears plain that a District Court as well as this court is obligated to give effect to any change in state law made during the course of a proceeding, and we perceive no reason to doubt but that the obligation persists even though it requires further consideration of a question previ-

ously decided by a decree which under some circumstances may be regarded as final."

In contending that the order appointing a receiver was final and appealable, petitioner cites *Hermanos* v. *Puerto Rico*, 118 Fed. (2) 757 (CCA 2). The *Hermanos* case in indeed pertinent. But it strongly supports respondent, not petitioner. In the *Hermanos* case, the decree appointed, *not* an interlocutory receiver as custodian of property pending the entry of an ultimate decree, but a *statutory receiver as successor to the corporation*, finally adjudicated that the officers and directors of the corporation had no authority to administer its affairs, *permanently divested title*, and authorized the receiver to create substantive "liens which will take precedence over the property interests of the shareholders." Of this decree, the Court said,

> "Such an order, in our opinion is a 'final decision' within the meaning of 28 U.S.C.A. sec. 225."

But the Court made the following observation, most pertinent in the instant case, at page 757:

> "The ordinary order, appointing a receiver is truly interlocutory, *leaving questions of substantive right for future determination.*" (Emphasis supplied.)

Petitioner does not cite a single case in which any court, State or Federal, has held that a decision on an interlocutory appeal is *res judicata* merely because the reviewing court might have decided the merits upon such an appeal.

II.

Petitioner's contention that the Court of Appeals misapplied Lynch v. Ilg should not evoke certiorari.

A

While this Court may, it almost never will, grant certiorari merely to reappraise the decision of a Court of Appeals upon a question of State law.

We recognize that whereas this Court does not possess jurisdiction to review a State court's decision on a point of that State's law, it does in the technical sense have jurisdiction to review the application by a Court of Appeals of State law under *Erie Railroad* v. *Tompkins*, 304 U. S. 64.

However, exercise of this discretion is almost never indulged in cases such as this one, that is, in cases where a Court of Appeals has construed a State statute in the light of an authoritative or even a merely persuasive decision of a State court.

Nor will this Court usually grant *certiorari* merely to review lower Federal courts' construction of a private contract in the light of applicable State decisions.

In this case the Court of Appeals has done no more than hold that *Lynch* v. *Ilg* ranges Illinois among those States that sanction exonerative provisions in articles of partnership.

We must suggest, too, that in this case the petitioner herself sought a Federal, not a State, tribunal for adjudication of rights arising wholly under Illinois law. The respondent, a citizen of Illinois, could not have removed this case to the district court had petitioner instituted it in a State court. Petitioner could have had an adjudication upon this question of her law by Illinois courts had she desired such an adjudication.

B

The Court of Appeals correctly applied Lynch v. Ilg to the instant case. The result is consonant with the clearly expressed intention of the parties and with justice.

The logic of *Lynch* v. *Ilg* is simple. It has commended itself to many but not to all other courts.

Litigation between a surviving partner and the personal representative of a deceased partner can be costly and bitter. It may well devour all of the assets of a small business, particularly a business in which it is skill and not assets that produce the earnings. There is nothing unreasonable about a State's permitting each partner to say in effect to the other, "I will renounce any claim for my estate if I predecease you if you will renounce any claim for your estate if you predecease me."

Petitioner says at page 20 of the petition:

> "The court in its final opinion overlooked entirely the express provision of Section 340, Chap. 3 of the Illinois Revised Statutes, which in substance provides an easy, simple and effective way if disposing of partnership estates. Said statute even dispenses with the requirement of opening an estate. All the defendant had to do within sixty (60) days after the death of his brother was to file a verified inventory of the partnership assets and pay the heirs their just share of the partnership assets."

The fallacy of this observation is apparent:

No matter how fairly, justly, even generously a surviving partner may inventory the deceased partner's share of the estate, there is nothing to prevent a dissatisfied personal representative from prosecuting litigation for many years and through many courts in attempting to overturn that accounting.

In this very case, had the intention of the parties been given prompt fulfillment, this costly litigation would have been avoided.

Nor is there merit to the contention of petitioner expressed in the following language at page 22 of her petition:

> "If this decision is permitted to stand instrumentalities purporting to create joint tenancies with the incident of survivorship in partnership property will be fraudulently used as a convenient means of defeating widows of their dower rights and to defeat the rights of widows and minor children of deceased partners of their rights of inheritance. The holding is not only inequitable and contrary to the law of partnerships but is of nationwide application and importance."

The mere fact that a type of contract may be abused is no ground for invalidating it. Actually, neither wives nor children have any "right of inheritance" save such as the State law gives to them. In most states a man can disinherit his children entirely and give away all personal property as well as most of his real estate, to the exclusion of the rights of the widow.

Finally, this question is not, as petitioner says, "of nationwide application and importance." The only substantive questions presented to the Court in the case are ones of State law and are of the construction of a particular contract between two brothers. This Court's decision could not settle the law even for Illinois, to say nothing of the other forty-seven states.

Conclusion.

For reasons apparent in the present opinion of the Court of Appeals and urged in this brief, it is respectfully submitted that *certiorari* should be denied.

WILLIAM C. WINES,

Attorney for Respondent.

APPENDIX A.

Jones v. Schellenberger, 225 F. 2d 784.

The plaintiff, formerly Billie P. Schellenberger, widow of Ralph D. Schellenberger, Texas administratrix of his estate and a citizen of Texas, brought this suit in the Northern District of Illinois against the defendant, James A. Schellenberger, a citizen of Illinois, brother of Ralph surviving partner of an automobile retailing partnership which was dissolved by Ralph's death, for an accounting with respect to the affairs of the firm.

Ralph D. Schellenberger died July 1, 1945, and the complaint was filed October 14, 1948. Defendant's answer to said complaint was filed November 10, 1948, to which was attached a copy of the articles of co-partnership entered into between the decedent and the defendant, dated December 10, 1937.

After prolonged litigation, including two previous appeals to this court, 196 F. 2d 852, and 201 F. 2d 29, with numerous references to a Master, a decree was entered September 27, 1954, approving in the main the report and supplemental report of the Master, dated respectively June 10, 1953 and August 21, 1953, in which it was adjudged and decreed that the plaintiff have and recover from the defendant the sum of $268,049.13, together with certain specified interest and costs. From this decree defendant appeals.

The partnership agreement set forth in detail the rights, duties and obligations of the partners, including the following provisions:

> "It is further agreed that the party of the first part and the party of the second part shall both and each of them participate and own the said business and partnership jointly as joint tenants with the right of survivorship, and upon the death of either party hereto, all right, title and interest therein shall vest immediately unto the surviving partner.
>
> * * * * * *
>
> "In case of the death of either partner, the whose of the assets or effects of the said partnership shall accrue immediately to the surviving partner."

(The instant controversy turns upon the effect to be given to this language, which will subsequently be referred to as the "survivorship provision.")

The sole reason urged for reversal is that by the "survivorship provision" all of the partnership property at the time of the decedent's death passed to the defendant and he became the sole owner thereof. This, so it is asserted, constitutes a bar to plaintiff's cause of action and requires a reversal with directions to dismiss the complaint. Defendant, in support of this contention, relies almost exclusively upon a decision of an Illinois Appellate Court, *Lynch* v. *Ilg*, 348 Ill. App. 545, 109 N. E. 2d 362 (hereinafter referred to as the *Lynch* case), in which the Illinois Supreme Court, on January 15, 1953, denied leave to appeal, 413 Ill. 633. It appears that the *Lynch* case is the first and only decision by an Illinois court construing and sustaining a partnership "survivorship provision." Defendant has attached to his brief a copy of the *Lynch* decision, it being reported only in abstract form.

This court, in an opinion rendered May 26, 1955, affirmed the judgment appealed from on the basis that defendant by his acts and conduct had waived the right to invoke the defense based upon the "survivorship provision." Such being our conclusion, we thought it unnecessary to consider or determine whether the rule announced in the *Lynch* case was applicable. We have, on this petition for rehearing, reached the conclusion that our previous decision was erroneous. That decision, therefore, and all orders entered pursuant thereto are vacated and set aside.

While we need not offer any excuse for reaching what we now think was an erroneous conclusion, it is perhaps pertinent to note that we labored under the impression that the *Lynch* decision was not called to the attention of the Master or the District Court. In fact we stated, "Another indication that defendant by his then counsel recognized that the present issue had been either waived or finally adjudicated resides in the fact that the Illinois Appellate Court decision now so heavily relied upon, rendered almost two years prior to the decree appealed from, was not cited or called to the attention of the District Court." This erroneous statement, relied upon to fortify our conclusion that the defendant had waived the survivor-

ship defense, was due to the fact that we examined only the printed record, which did not contain either the Master's report or the opinion of the District Court rendered on defendant's objections to the Master's report and upon which was predicated the decree from which the appeal comes. However, the original transcript of the record contains a copy of the Master's report and the opinion of Judge Campbell, together with the decree. Both the Master's report and the court's opinion disclose that the survivorship issue was heavily relied upon by the defendant and that it was thoroughly considered, discussed and decided adversely to the defendant. Moreover, plaintiff did not raise before the Master or the District Court the issue of waiver by defendant. As a matter of fact no such issue was raised by the plaintiff in this court, although it was incidentally referred to in her brief.

In *Southern Railway Company* v. *Clift*, 260 U. S. 316, 319, 43 S. Ct. 126, 67 L. Ed. 283, the court, with reference to a prior ruling in the same case, stated:

> "The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and *res judicata*. One directs discretion; the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission."

In *Messinger* v. *Anderson*, 225 U. S. 436, 444, 32 S. Ct. 739, 740, 56 L. Ed. 1152, the court stated:

> "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. [Citing cases.]"

[2] Furthermore, it is the duty of federal courts at any stage in the course of a proceeding to give effect to state law. In *Huddleston* v. *Dwyer*, 322 U. S. 232, 236, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246, the court quoted from its previous decision in *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 543, 61 S. Ct. 347, 85 L. Ed. 327, as follows:

> "'Until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law

> under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.'"

Under this pronouncement it appears plain that a District Court as well as this court is obligated to give effect to any change in state law made during the course of a proceeding, and we perceive no reason to doubt but that the obligation persists even though it requires further consideration of a question previously decided by a decree which under some circumstances may be regarded as final.

Defendant's counsel, who has represented him only on this appeal, appears to sense the situation. His petition for rehearing contains the following headnote, "Any actual imposition upon Mrs. Schellenberger because of reversal by this Court can be corrected by this Court's or the District Court's apportionment of costs." The petition continues: "* * * if this Court feels that she has been substantially prejudiced by the expense incidental to the defendant's appeals from the interlocutory orders or has otherwise suffered because this litigation has been unnecessarily protracted, it is within this Court's power to rectify that injustice by apportionment of the costs, expenses and attorneys' fees, including the taxing of all of the expenses of the receivership and such other items as may appear to the Court to be just, against the defendant." We appreciate this candid concession on the part of defendant's counsel. In our view, defendant should be required to pay all costs and expenses incurred in this proceeding, and all costs in this court are taxed to him. We think the taxation of costs other than those incurred in this court is a matter for the District Court.

The decree appealed from is reversed and the cause remanded, with directions that the complaint be dismissed upon payment by the defendant of the costs taxed in this court and those which have or may be taxed against him in the District Court.